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No. 92-1967

In The

Supreme Court of the United States

October Term, 1993

SILVER CLOUD, INC. d/b/a COLUMBIANA PLASTICS; and STEPHEN J. MOTOSKO, II,

Petitioners,

v.

NATIONAL KITCHEN PRODUCTS, EDWARD J. MORRIS and QUIKUT, A DIVISION OF THE SCOTT FETZER COMPANY,

Respondents.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that two questions are presented for review, as follows:

1. In a case involving multiple claims for relief and the granting by oral opinion of a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) in favor of defendants, which ruling adjudicates fewer than all the claims and the rights and liabilities of fewer than all the parties with no express determination pursuant to Fed.R.Civ.P. 54(b), whether a "Motion for Reconsideration" filed by plaintiffs after such oral opinion and before submission of the case to the jury specifically requesting that the District Court submit the adjudged claims to the jury, constitutes a motion filed pursuant to Fed.R.Civ.P. 59(e) so as to suspend, pursuant to Fed.R.App.P. 4(a), the time for filing a notice of appeal;

2. Whether such a "Motion for Reconsideration" remains pending even after the District Court (a) submits the case to the jury without the previously adjudged claims; (b) instructs the jury without objection from plaintiffs that the previously adjudged claims have been resolved and are not before the jury for its consideration, and (c) thereafter enters final judgment expressly adopting its prior oral decision, when plaintiffs themselves filed two notices of appeal following such final judgment.

CORRECTED LIST OF PARTIES

All parties are listed in the caption. However, Petitioners incorrectly identified Respondent National Kitchen Products as a corporation wholly owned by Respondent Edward J. Morris when, in fact, National Kitchen Products is a sole proprietorship under which Respondent Edward J. Morris conducted business.

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National Kitchen Products ("NKP"), Edward J. Morris ("Morris") and Quikut, a division of The Scott Fetzer Company ("Quikut"), hereby jointly oppose the Petition for Writ of Certiorari.

Respondents submit that only after Petitioners made the fatal mistake of failing to file a third and timely notice of appeal following the District Court's ruling on their own time-tolling motion, after having previously filed two premature and ineffective notices of appeal (a mistake Petitioners acknowledged to the Court of Appeals),

did Petitioners conjure up the issues which they now present to this Court, both of which were soundly rejected by the Court of Appeals.

Respondents submit that there exists no special or important reason for this Court to grant the petition for a writ of certiorari.

OPINIONS AND ORDERS BELOW

In addition to those referenced by Petitioners, Respondents include the following:

During a chambers conference on October 6, 1992, before the case was submitted to the jury, the District Court advised that it would not change its ruling regarding the directed verdict (Appendix A hereto).

The District Court, as a part of its charge, instructed the jury that "the antitrust issues have been resolved" (Appendix A hereto).

The Court of Appeals entered its decision dismissing the Petitioners' First Notice of Appeal on December 8, 1992 (Appendix B hereto).

On December 11, 1992, the District Court issued its marginal entry order, dated December 9, 1992, denying plaintiffs' Motion for Prejudgment Interest (Appendix C attached hereto).

STATUTES AND RULES INVOLVED

In addition to the rules cited by Petitioners, this case involves the following rule:

Fed.R.Civ.P. 54 provides:

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

Petitioners have made several misstatements in, and material omissions from, their Statement of the Case. Respondents accordingly submit the following corrections and additions.

Contrary to the statement of Petitioners, Morris through his company NKP was *not* the nation's only existing supplier of manually-operated vegetable slicers to the demonstration market, and Morris was *not* one of Quikut's largest knife customers. Indeed, Morris' purchases represented only approximately 2% of Quikut's annual sales.

By oral opinion issued on September 30, 1992, the District Court granted Respondents' Motion for Directed Verdict as to the antitrust claims and denied Respondent Quikut's Motion for Directed Verdict as to the contract claim. After Petitioners filed their Motion for Reconsideration on October 5, 1992, the District Court (Sam H. Bell, J.) advised orally during a chambers conference on October 6, 1992, before the case was submitted to the jury, that "I'm not going to change the ruling." (See Appendix A hereto – excerpts of Transcripts of Proceedings on October 6, 1992, at p. 3).

Judge Bell's statement followed a general reference to his ruling on both motions for directed verdict. A discussion then ensued regarding the manner in which the dismissal of the antitrust claims would be explained to the jury (Appendix A hereto at pp. 4-5). Specifically, Judge Bell proposed to counsel the following statement:

> During the period of your absence, the antitrust issues have been resolved. They will not be before you for your consideration. *Id.*

Counsel for Petitioners did not object to such statement. *Id.*

Thereafter, Judge Bell instructed the jury, giving that precise statement. *Id.* at 6. Following the jury instruction, Judge Bell expressly invited any additions or corrections from counsel. Counsel for Petitioners had "nothing further." *Id.* at 7.

Following the October 7, 1992 jury verdict, Petitioners filed their Motion for Prejudgment Interest (Docket Entry 159).

On October 14, 1992, Judge Bell entered final judgment, expressly adopting the oral opinion of September 30, 1992 and entering judgment in accordance with Fed.R.Civ.P. 58, "thus terminating this action in its entirety." (Docket Entry 163 and Appendix B to Petition for Writ of Certiorari).

On October 17, 1992, Respondent Quikut filed its Motion for Judgment as a Matter of Law, or, alternatively, for a new trial (Docket Entry 166). While Quikut's motion was still pending, Petitioners filed their first Notice of Appeal on November 12, 1992 (Docket Entry 172, see Appendix D hereto). The Sixth Circuit Court of Appeals *sua sponte* dismissed that appeal by Order filed December 8, 1992, as being premature (Appendix B hereto). Thereafter, on November 16, 1992, Judge Bell filed and issued his Order denying Quikut's Motion (Docket Entry 171).

While Petitioners' Motion for Prejudgment Interest was still pending, they filed their second Notice of Appeal on December 7, 1992 (Docket Entry 178). On December 11, 1992, Judge Bell issued its marginal entry order, dated December 9, 1992, denying Petitioners' Motion for Prejudgment Interest (Appendix C hereto).

Petitioners failed to file a Notice of Appeal after December 11, 1992.

REASONS WHY REVIEW SHOULD NOT BE GRANTED

This action involves neither a split of authority among the Circuit Courts of Appeals, nor any departure by the Court of Appeals from the accepted and usual course of judicial proceedings, or the sanctioning of any such departure by the District Court. Thus, none of the reasons set forth in Rule 10.1 of the Supreme Court Rules is present here and, therefore, the petition for Writ of Certiorari should be denied.

Rather than a conflict among the Circuit Courts of Appeals as suggested by Petitioners, the decisions by the Circuit Courts of Appeals are consistent and are merely distinguishable on the basis of the varying fact patterns, which heavily drive the determination as to whether a "Motion for Reconsideration" constitutes a Motion to Alter or Amend a Judgment pursuant to Fed.R.Civ.P Rule 59(e).

In addition, Petitioners' present expression of confusion as to the finality of the judgment entered in this case is nothing more than a desperate afterthought, created

after they realized their fatal mistake of not filing a Notice of Appeal after the ruling on their own Motion for Prejudgment Interest, despite this Court's clear and unequivocal pronouncement in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). Moreover, any professed confusion by Petitioners was of their own making.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

Petitioners have, in the first instance, mischaracterized the issue before this Court. Petitioners have erroneously characterized the "Motion for Reconsideration" below as a "Motion to Alter or Amend a Judgment." In fact, it was no such thing, which was one reason the Sixth Circuit Court of Appeals rejected Petitioners' argument below, and dismissed their second appeal as untimely. This very issue – whether a "Motion for Reconsideration" constitutes a Rule 59(e) motion – has been essentially uniformly analyzed by various Circuit Courts of Appeals, with different results driven by different factual scenarios. This is no different from the different outcomes resulting from the uniform application of *any* legal principle to differing fact scenarios.

Petitioners correctly point out that the Federal Rules of Civil Procedure make no provision for a "Motion to Reconsider," citing to *McDowell v. Dynamics Corp. of America*, 931 F.2d 380 (6th Cir. 1991), and *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). What Petitioners do *not* point out is that those two decisions, by the Sixth Circuit itself, reached different results as a result of the different factual scenarios involved. *Smith, supra*, involved the grant of a

motion for summary judgment which terminated the litigation, subject only to the formal entry of judgment pursuant to Rule 58. Plaintiffs moved to "reconsider and vacate" prior to the formal entry of final judgment, which motion was treated by the District Court as a Rule 59(e) motion.

In the more recent decision in *McDowell, supra*, however, the Sixth Circuit reached a different result because of the different facts. Defendant had filed a "motion for reconsideration," requesting the District Court to reconsider its decision to set aside summary judgment. The Sixth Circuit noted that, "[a]lthough motions for reconsideration are often treated as Rule 59 motions, appellant's motion was not one that is contemplated by Rule 59." *Id.* at 382. The Sixth Circuit, after dissecting the relief requested, concluded that because the "motion for reconsideration" was not a motion for a new trial and there was no judgment that could be altered, defendant's Motion was *not* a Rule 59 motion.

It is undisputed that, in this case, the September 30, 1992 oral ruling of the District Court, granting a directed verdict on the antitrust claims but leaving the contract claim for submission to the jury, was an interlocutory decision governed by Fed.R.Civ.P. 54(b). The District Court did not direct the entry of a final judgment by an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Therefore, the directed verdict on the antitrust claims clearly was not a "judgment," expressly

defined in Fed.R.Civ.P. 54(a) as "a decree and any order from which an appeal lies."[1]

Instead, the directed verdict was an "order or other form of decision [which] is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), *supra*. The Motion for Reconsideration below was clearly a *Rule 54(b)* motion for revision of an interlocutory order and, equally clearly, not a *Rule 59(e)* motion to alter or amend a nonexistent judgment.

Moreover, it is undisputed that the District Court did not view the Motion for Reconsideration as a Rule 59(e) motion, or treat it as such. Rather, the District Court proceeded in the October 14, 1992 final judgment entry to reaffirm expressly the oral opinion directing a verdict on the antitrust claims and thereafter to dispose of Quikut's Rule 59(e) motion on November 16, 1992, and plaintiffs' Rule 59(e) Motion for Prejudgment Interest on December 11, 1992.

Petitioners argue that the Sixth Circuit decision below conflicts with decisions by the Tenth Circuit, citing *Hilst v. Bowen*, 874 F.2d 725 (10th Cir. 1989), and *Director of Revenue v. United States*, 392 F.2d 307 (10th Cir. 1968). There is, however, no such conflict.

In *Hilst, supra*, prior to entry of formal judgment, plaintiffs moved for reconsideration of an order granting defendant's motion to dismiss the entire action. The District Court appropriately concluded that the motion for

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[1] Thus, as in *McDowell, supra*, there was no "judgment" for the District Court to alter.

reconsideration of the dismissal, which was a final judgment, was a Rule 59(e) motion, and the Tenth Circuit affirmed.

The Tenth Circuit's decision in *Hilst, supra,* is entirely consistent with the Sixth Circuit's decision in *Smith, supra.* Both decisions involved a "final judgment," awaiting only a formal entry pursuant to Rule 58. Neither decision involved an interlocutory order, as is present in the instant case. Indeed, the Tenth Circuit in *Hilst, supra,* expressly distinguished the interlocutory judgment as follows:

> The case of *Stephenson v. Calpine Conifers, II, Ltd.*, 652 F.2d 808 (9th Cir. 1981), cited by defendant, is factually distinguishable. There the district court denied motions to reconsider grants of partial summary judgments without ever ordering entry of judgment in favor of the parties obtaining partial relief. That case raised peculiar issues of finality under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291, which are not present here.

Hilst, supra, 874 F.2d at 726 n.2.

Since the instant action involved a motion for reconsideration of an interlocutory order, a situation which *Hilst* expressly distinguished, *Hilst,* by its own definition, is distinguishable from, and not in conflict with, the Sixth Circuit decision below.

The Tenth Circuit decision in *Director of Revenue, supra,* is likewise distinguishable from the instant action. In that case, a motion for rehearing or new trial was filed, again from a final judgment which had not yet been formally entered. The District Court treated the motion as a Rule 59 motion and, after the entry of final judgment,

proceeded to consider and deny the motion for rehearing or new trial. Not surprisingly, the Tenth Circuit determined that the District Court did not err in so doing. In its analysis, the Tenth Circuit emphasized that, " '[w]here the court has power to further review its judgment, it cannot be said that the judgment is final as long as it is being considered by the Court.' " *Id.* at 309. The Tenth Circuit also considered the decisions of the Ninth Circuit in *Agostino v. Ellamar Packing Co.*, 191 F.2d 576 (9th Cir. 1951), and of the Eighth Circuit in *Cohen v. Curtis Publishing Co.*, 333 F.2d 974 (8th Cir. 1964), and concluded "that each of these cases is distinguishable upon its own peculiar facts." *Id.* at 309-310.

In *Agostino*, the Ninth Circuit held that a motion to reconsider based upon arguments as to the law applicable to the case "was in effect denied by the findings of fact, conclusions of law and judgment entered after the motion to reconsider was filed." *Id.* at 577. The Ninth Circuit expressly held that "the denial of a motion need not be express but may be implied." *Id.* at 577. Similarly, in *Cohen, supra*, the Eighth Circuit concluded that plaintiffs' motion for reconsideration, through which plaintiffs sought to delete a word from an order, was effectively denied by the subsequent entry of final judgment based specifically upon the prior order. The Eighth Circuit held that the final judgment was "an approval of such order and a denial of plaintiff's request to amend by the deletion of the word 'wrongfully'. It impliedly and effectively denied plaintiff's motion." *Id.* at 977.[2]

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[2] The same result obtains in the Seventh Circuit. In *Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991), the Seventh

The Tenth Circuit's decision in *Director of Revenue, supra,* is significant both because it recognizes that factually different decisions are distinguishable – as opposed to being in conflict – and because the decisions it found to be factually distinguishable are factually similar to the instant action. Thus, as in *Agostino,* the relief requested in the instant action by Petitioners' Motion for Reconsideration (*i.e.*, to allow the antitrust issues to be submitted to the jury) was effectively overruled when the District Court refused to allow the antitrust issues to go to the jury. And, like in *Cohen, supra,* the final judgment entered on October 14, 1992 expressly referred to, reaffirmed and adopted the September 30, 1992 oral opinion, which was the subject of Petitioners' Motion for Reconsideration. Finally, unlike the situation in *Director of Revenue, supra,* the District Court did *not* treat Petitioners' Motion for Reconsideration as a Rule 59(e) motion.

The foregoing discussion demonstrates that the issue presented by Petitioners is a fact-driven issue; the Circuit Courts of Appeals readily recognize that factually distinguishable features lead to differing results; and the decisions based on facts similar to the instant action are, in fact, entirely consistent with the decision of the Sixth Circuit reached below. There is no "conflict" among the Circuit Courts of Appeals as asserted by Petitioners and,

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Circuit concluded that a pre-judgment motion for new trial is essentially denied by the filing of the judgment thereafter. The Seventh Circuit noted that "any other approach produces a morass." *Id.* at 313. Emphasizing the need for simplicity and clarity, the Seventh Circuit cautioned that "[t]he only hope of fulfilling these goals, lies in treating the judgment as denying pending Rule 59 motions." *Id.*

therefore, the Petition for Writ of Certiorari should be denied.

Moreover, Petitioners' Motion for Reconsideration was a Rule 54(b) motion for revision of an interlocutory order, and *not* a Rule 59(e) motion to alter or amend a nonexistent judgment. However, even if the Motion for Reconsideration were properly deemed a Rule 59(e) motion, the same was effectively – indeed, virtually expressly – denied upon the subsequent entry of the final judgment on October 14, 1992, which expressly adopted the directed verdict.

II. THE COURT SHOULD NOT GRANT THE PETITION, SINCE THE DECISIONS ARE CLEAR AND PETITIONERS' PROFESSED "CONFUSION" IS A MERE FABRICATION.

Once again, Petitioners beg the question by assuming that the Motion for Reconsideration below was a Rule 59(e) motion. It was not.

However, addressing the substance of Petitioners' argument, it is important to review its context. This begins with a consideration of *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), which clearly and unequivocally held that a motion for prejudgment interest is a Rule 59(e) motion. Thus, both notices of appeal filed by Petitioners prior to the December 11, 1992 denial of their Motion for Prejudgment Interest were of no effect. Apparently overlooking *Osterneck, supra*, Petitioners committed the fatal mistake of failing to file a Notice of Appeal after the December 11, 1992 decision. Only when Respondents moved to dismiss Petitioners' appeal did Petitioners seize

upon their "Motion for Reconsideration" in a desperate attempt to avoid the obvious consequences of their clear mistake.

Petitioners' now-professed "confusion" is not only unsupported by the record, but is belied by their very conduct below. Indeed, the following obviated any "confusion" concerning the District Court's action:

(1) The case law discussed above, all of which is entirely consistent with the Sixth Circuit decision below;

(2) The colloquy which preceded the submission of the case to the jury, during which the trial judge stated he would not change his ruling and obtained the approval of all counsel of a statement to the jury that "the antitrust issues have been resolved";

(3) Petitioners' counsel did not object to or otherwise protest such statement, either before or after the jury was charged;

(4) The case was submitted to the jury without the antitrust issues, contrary to the specific relief sought in the Motion for Reconsideration;

(5) The October 14, 1992 Judgment Entry expressly ordered that "all remaining claims of plaintiff against all defendants are dismissed, with prejudice;" and

(6) The October 14, 1992 Judgment Entry *further* ordered that "the court's oral opinion of 30 September 1992 is hereby adopted in accordance with Fed. R. Civ. P. 52, and this judgment is hereby entered in accordance

> with Fed. R. Civ. P. 58, thus terminating this action in its entirety."

Under such circumstances it is difficult to understand how Petitioners could now argue that their Motion for Reconsideration of the directed verdict, which requested that the antitrust issues be submitted to the jury, could conceivably remain pending after the October 14, 1992 Judgment Entry. As if it were not clear enough from the language that "all remaining claims of plaintiff against all defendants are dismissed, with prejudice," the District Court made it perfectly clear that it was not further entertaining the antitrust issues by then expressly adopting the September 30, 1992 oral opinion, which dismissed such claims.

Beyond that, however, Petitioners simply were *not* confused[3] about the Motion for Reconsideration, and they have so demonstrated by their own conduct. Thus, on November 12, 1992, Petitioners filed their first Notice of Appeal "from the final judgment in this case (and the decisions of the Court incorporated therein) entered on October 14, 1992 (Appendix D hereto)."

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[3] Of course, Petitioners are directly responsible for the "confusion" of which they now complain. It was they who: filed the "Motion for Reconsideration," which is nonexistent under the Federal Rules; sat silently while the District Court advised the jury that the antitrust issues were resolved; filed the time-tolling Motion for Prejudgment Interest; did not file a new trial motion; and filed two premature notices of appeal during the pendency of time-tolling motions. In essence, it is the effect of Petitioners' own actions which Petitioners now claim to be confusing. Moreover, Petitioners' claimed "confusion" is a mere fabrication, as discussed more fully herein.

Plaintiffs had prematurely filed the first notice of appeal because Quikut's post-trial motion was clearly a time-tolling motion under Rule 59. On November 16, 1992, Quikut's motion was denied. Petitioners then apparently realized that their first Notice of Appeal was premature. Hence, they filed their second Notice of Appeal on December 7, 1992. Almost simultaneously, the Sixth Circuit issued its *sua sponte* order on December 8, 1992 (Appendix B hereto), dismissing the first appeal as premature because of Quikut's prior time-tolling motion.

Two matters are clear from these activities: First, Petitioners were themselves aware, and were also subsequently made expressly aware by the Sixth Circuit, that a Notice of Appeal filed during the pendency of a time-tolling motion such as under Rule 59, is premature and of no effect. Second, Petitioners well knew that their Motion for Reconsideration was *not* a time-tolling Rule 59(e) motion and/or had been previously denied, since otherwise there was no reason whatsoever for Petitioners to have filed the *second* Notice of Appeal.

Plainly and simply, Petitioners were not confused about the status of the Motion for Reconsideration. They well knew that the Motion for Reconsideration, if not denied during the pre-jury submission colloquy on October 6, 1992 or by the submission of the case to the jury without the antitrust issues, was clearly laid to rest by the October 14, 1992 Judgment Entry. Thus, the issue now presented by Petitioners to this Court is a mere fabrication, submitted in a desperate attempt to overcome their fatal failure to file a timely Notice of Appeal. This Court

should not countenance a fabricated issue and a pretended conflict as a basis for granting the petition for review herein.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC, Plaintiff, vs. NATIONAL KITCHEN PRODUCTS AND QUIKUT DIV. OF SCOTT FETZER CO, Defendants.	)	Civil No. 1:89CV1729 (Filed Feb. 18, 1993)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE SAM H. BELL JUDGE
OF SAID COURT, AND A JURY ON OCTOBER 6, 1992

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* * *

[p. 5] MR. GUSTER: Wasn't gone into by me, your Honor. I just don't see how it could be probative. It's so long after the termination of the contract and the term of the contract.

MR. MORLEY: I'm just assuming, maybe I'm wrong, that attorney Guster is going to argue that Mr. Motosko's vegetable slicer is, when it was presented to them, was not a workable, marketable, safe, salable item. Maybe I'm wrong.

THE COURT: The vegetable slicer, I presumed that would be one of your arguments.

MR. GUSTER: Of course.

THE COURT: The vegetable slicer itself is simply the plastic body of it.

MR. MORLEY: That's what was sold.

THE COURT: And this you would suggest that even though it was sold after the termination of the contract it was still the same plastic product, merchantable, just as it was prior to the termination of the contract.

MR. MORLEY: No question about that.

THE COURT: Okay, I'll admit 35. I see no reason to not admit the Ginsu knife.

(Off the record discussions)

MR. GUSTER: At the end of Plaintiff's opening [p. 6] statement I moved for directed verdict on the grounds there had been no cause of action stated with respect to the breach of contract. And I continue to adhere to that position. Recall that as originally cast the breach of contract claim as pleaded suggested that we, that Quikut had breached the contract and that by reason of the alleged conspiratorial action the contract was interfered with and breached by the defendants Morris and Quikut.

Your Honor's ruled on the motion for directed verdict as to the antitrust claims. The case no longer has that aspect of conspiracy with respect to the contract. And I will adhere to my former position that there was no statement of claim made in the opening statement and no breach of the contract alleged or stated.

THE COURT: Well, I'm not going to change the ruling.

MR. GUSTER: I understand. I want to make the record, your Honor. (pause) May I have an objection to page 108 about the expert testimony.

THE COURT: Sure. I'm going to leave it in.

MR. MORLEY: Webster Harpman testified and mainly about the invention.

THE COURT: Yes; that's why I left it in.

MR. GUSTER: With that exception, your Honor.

THE COURT: Everything is in there that you

* * *

[p. 10] And in any event, I think from a speculation standpoint it isn't speculative. Our argument is that the market was 300,000 a year and that is based exclusively, exclusively on Quikut's market research.

MR. GUSTER: Your Honor, Mr. Morley is trying to amend the contract to include language that he suggests is an agreement in addition that Mr. Motosko proposed at the time of its execution. The contract precludes, its express terms preclude the addition of any such requirement. The only requirement in this contract was to purchase 50,000 units a year in a two year period. At the end of the first period, 50,000 had not been purchased it became a non-exclusive agreement.

MR. MORLEY: I'm not making myself clear. I'm not saying that Quikut would have had to purchase 300,000 a year thereafter, but the result of the marketing would have been that demonstrators across the United States would purchase 300,000 a year, and Mr. Motosko has testified that he had those production capabilities.

THE COURT: Let me think about it for a couple minutes. Two other things I'd like to suggest to you. I would like – I think it may be advantageous to you and maybe you let me charge the jury before you argue. But in any event, I prepared this statement as well.

"During the period of your absence the [p. 11] antitrust issues have been resolved. They will not be before you for your consideration. Remaining issues for your determination will be the claim of plaintiff for breach of contract. You are instructed now that in reaching your

verdict in this case you shall consider only that evidence introduced during trial which relates to the issue given to you for your decision.

"You may consider any evidence adduced relating to the antitrust issue only, and if that evidence bears on the issue of breach of contract which is to be the subject of your verdict in this case."

Is this agreeable to you.

MR. GUSTER: Your Honor, I think the jury's entitled to know that the antitrust claims have been resolved in favor of Quikut.

THE COURT: I'm not going [sic] tell them that, no. I'm not going to do that, Dick. They don't have to know that. All they have to know is they're out. Okay, give me a couple minutes. May I see the exhibit, the contract? Would one of you bring me that?

MR. GUSTER: Yes.

(Recess 8:53 – 9:10)

THE COURT: Counsel has given to me as the record already indicates a proposed jury instruction. I've read the case law as it applies, and I think the [p. 12] reference is made in the annotations given to special circumstances which may lead to special damages in a case of consequential damage in this respect. I think that is not applicable here in relation to the facts or the distributor agreement.

However, I don't think it forecloses your argument of that under the charge, which is already given or will be

given by the Court. So, I won't foreclose you in argument in that regard.

MR. MORLEY: The argument that I made prior earlier this morning that the 300,000, et cetera, sales could have been generated?

THE COURT: Yes. I think it would be well for you if I just went ahead and charged them in view of the preliminary and then you can argue the case.

(Jury in the box at 9:12)

THE COURT: I hope you had a prosperous and good weather weekend at least. During the period of your absence the antitrust issues have been resolved. They will not be before you for your consideration. The remaining issue for your determination will be the claim of plaintiff for breach of contract. You are instructed now that in reaching your verdict in this case you shall consider only that evidence introduced during trial which relates to the issue given to you for your decision. You

* * *

[p. 69] notify us that you have reached a verdict.

No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing. And the Court will not communicate with you or any of you on any subjects [sic] which relates to the merits of the case except by doing it either in writing or orally here in open Court.

But you must also keep in mind that all during the period of your deliberations you should not say or write anything which would disclose to anyone, not to me or

not to anyone else, how your deliberations stand numerically or otherwise.

Only when you have all agreed on your verdict, that is, when you have reached unanimous agreement on that verdict, are you permitted to say by way of your verdict what you have decided concerning the issues in this case.

Counsel, aside from what we've discussed, are there any additions or corrections you wish made?

MR. GUSTER: No, your Honor. I think it's clear that the charge will go to the jury.

THE COURT: Yes, sir; it will.

MR. MORLEY: I have nothing further, your Honor.

THE COURT: You may now take this case and give it your fair consideration and return a verdict that

* * *

APPENDIX B

No. 92-4230

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SILVER CLOUD, INC., d/b/a Columbiana Plastics; STEPHEN J. MOTOSKO, II,	)	ORDER
Plaintiffs – Appellants,	)	(Filed
v.	)	Dec. 8, 1992)
NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS; QUIKUT, Division of Scott & Fetzer Company,	)	
Defendants – Appellees.	)	

BEFORE: GUY and RYAN, Circuit Judges; and LIVELY, Senior Circuit Judge.

The plaintiffs appeal final judgment in this antitrust action in which judgment was entered in plaintiffs' favor in a single count and plaintiffs' remaining claims were dismissed. The district court entered its judgment on October 14, 1992. On October 27, 1992, defendant Quikut moved for judgment as a matter of law or, alternatively, for a new trial. That motion was filed within ten days of judgment, as calculated under Fed. R. Civ. P. 6(a), and was therefore timely. While that motion was pending, the plaintiffs filed the instant notice of appeal from the dismissal of their remaining claims. Subsequently, Quikut's post-judgment motion was denied.

If a timely motion for new trial is filed by any party, the time for appeal for all parties shall run from the entry of the order denying a new trial. Fed. R. App. P. 4(a)(4); *see Marrical v. Detroit News, Inc.*, 805 F.2d 169, 171 (6th Cir. 1986) (per curiam). A notice of appeal filed before the disposition of such a motion shall have no effect. *Id.*; *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). A new notice of appeal must be filed within the prescribed time for appeal, measured from the entry of the order disposing of the motion. In the instant case, the district court has entered an order denying the motion for new trial.

Therefore it is ORDERED that this appeal is dismissed *sua sponte* as premature without prejudice to plaintiffs' right to perfect a new, timely appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKO, II Plaintiffs vs. NATIONAL KITCHEN PRODUCTS, ET AL Defendants	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL MOTION FOR PREJUDGMENT INTEREST

Now come Plaintiffs, hereinafter referred to as "Motosko", and hereby move this Court, pursuant to Ohio Revised Code Section 1343.03(A), for prejudgment interest on the jury verdict rendered in this matter on October 7, 1992. A Memorandum is [sic] Support of this Motion is attached hereto and incorporated herein.

Respectfully Submitted,

[Motion denied
/s/ SHB
12/9/92]

(Filed Dec. 12, 1992)

/s/ Michael Morley
MICHAEL MORLEY – 0021154
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKI, II Plaintiffs	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL
vs.	NOTICE OF APPEAL
NATIONAL KITCHEN PRODUCTS, *et al.*, Defendants	(Filed Nov. 12, 1992)

Notice is hereby given that plaintiffs, Silver Cloud, Inc. d.b.a. Columbiana Plastics and Stephen J. Motosko, II, do hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment in this case (and the decisions of the Court incorporated therein) entered on October 14, 1992.

Respectfully submitted,

/s/ Jack M. Schulman
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Attorney for Plaintiffs Silver Cloud, Inc. d.b.a. Columbiana Plastics and Stephen J. Motosko, II

CERTIFICATION OF SERVICE

A copy of the foregoing "Notice of Appeal" was sent by regular U.S. Mail, postage prepaid, this 12th day of November, 1992, to:

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